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is the first case in which the Supreme Court of the state has definitely abandoned it. By this decision California is brought into harmony with the weight of authority in the United States on this question¹⁰ and the result is desirable in a situation where there is no other adequate relief for creditors and stockholders, such as that in the principal case.

E. M. C.

PERSONS: ANNULMENT OF MARRIAGE ON THE GROUND OF FRAUD.—There are three steps or stages in the formation of a complete marriage. The first step is the agreement to marry. Here there is only a contract, which the law treats as such. An action for breach will lie,¹ and misrepresentations as to reputation, family, station in life and fortune constitute such fraud as will afford a defense or ground for rescission.² The second step is the performance of the marriage ceremony. At this stage there is more than a contract,³ and a greater degree of fraud is necessary to avoid the relationship than that required to vitiate an ordinary contract,⁴ or rescind the mere contract to marry.⁵ But desertion at this stage, and refusal to take the third step is sufficient fraud to support a bill for annulment.⁶ The third step consists in going beyond the mere ceremony, and, actually or ostensibly, living together as husband and wife. Here the fraud of the contractual stage is likewise insufficient, and that which will render the marriage voidable must reach to the essence of the relation.⁷

⁹ *Supra*, n. 1.

¹⁰ *Ann. Cas.* 1914 B, 240; *Gibbs v. Morgan* (1903), 9 Idaho 100, 72 Pac. 733, interpreting a statute identical with the California statute.

¹ *Hunt v. Peake* (1826) 5 Cow. 475; *Kelley v. Riley* (1871), 106 Mass. 339.

² *Irving v. Greenwood* (1824), 1 Carr & Payne 350; *Berry v. Bakeman* (1857), 44 Me. 164; *Butler v. Eschleman* (1856), 18 Ill. 44.

³ *Svenson v. Svenson* (1904), 187 N. Y. 54, 70 N. E. 120; *Niboyet v. Niboyet* (1878), 4 P. Div. 1; *Adams v. Palmer* (1863), 51 Me. 480; *Hilton v. Roylance* (1902), 25 Utah 129, 69 Pac. 660; *Ditson v. Ditson* (1856), 4 R. I. 87; *Noel v. Ewing* (1857), 8 Ind. 37; *Wade v. Kalbfleisch* (1874), 58 N. Y. 282, 284; *Cook v. Cook* (1882), 56 Wis. 195, 14 N. W. 33; *Maynard v. Hill* (1887), 125 U. S. 190, 31 L. Ed. 654, 8 Sup. Ct. Rep. 723; *Andrews v. Andrews* (1902), 188 U. S. 14, 30, 47 L. Ed. 366, 23 Sup. Ct. 237.

⁴ *Franke v. Franke* (1892), 3 Cal. Unrep. 656, 31 Pac. 571; *Barnes v. Wyether* (1855), 28 Vt. 41.

⁵ *Weir v. Still* (1870), 31 Iowa 107; *Lyon v. Lyon* (1907), 230 Ill. 366, 82 N. E. 850; *Elser v. Elser* (1916), 160 N. Y. Supp. 724.

⁶ *Robert v. Robert* (1914), 150 N. Y. Supp. 366; *Moore v. Moore* (1916), 157 N. Y. Supp. 819; *Anders v. Anders* (1916), 224 Mass. 438, 113 N. E. 203; *Dorgeloh v. Murtha* (1915) 156 N. Y. Supp. 181.

⁷ Where the husband is a professional thief, held sufficient in *Keyes v. Keyes* (1893), 26 N. Y. Supp. 910. But an epileptic's misrepresentations that he had had no attack for eight years held insufficient in *Lyon v. Lyon* *supra*, n. 5. And concealment of disease sufficient in *Sobol v. Sobol* (1914), 150 N. Y. Supp. 248; *Ryder v. Ryder* (1894), 66 Vt. 158, 28 Atl. 1029; *Baker v. Baker* (1859), 13 Cal. 87; *Reynolds v. Reynolds* (1862), 3 Allen 605.

Refusal to perform in this stage the essential mutual obligations, together with the intent conceived from the beginning not to do so, will constitute such fraud.⁸ In *Millar v. Millar*⁹ the defendant went through the ceremony with the intent never to perform the obligation of marriage and thereafter refused to do so. The California Civil Code defines marriage as "a personal relation arising out of a civil contract, to which the consent of the parties is necessary,"¹⁰ and provides as one of the grounds for annulment, "that the consent of either party was obtained by fraud."¹¹ In the principal case the court annulled the marriage on the ground that the consent of the plaintiff was obtained by the fraudulent misrepresentations of the defendant that she would be his wife, and that this fraud went to the original validity of the marriage. Because of the fraud, the consent, which the code requires to the contract,¹² was never given. Hence, in spite of the ceremony, the parties had never passed beyond the contract stage, and, as this had been induced by fraud, the whole thing was void *ab initio*.

But the fraudulent intent at the outset, and the subsequent refusal to perform, are both present in the case. Are both necessary to establish fraud? The theory of the California court is that the fraud lies in the intent and misrepresentation in the beginning. Since the code provides that condonation after discovery, will cure the fraud,¹³ annulment could hardly be granted when the parties are fulfilling all the requirements of the third stage. Although most courts hold that bona fide intent and consent to the first stage is essential to the validity of the marriage,¹⁴ yet one case at least makes the refusal to perform the essential obligations ground for annulment without showing fraud at the outset.¹⁵

While most courts agree that marriage is more than contract, and that a greater degree of fraud than that which vitiates a contract is necessary to annul a marriage, yet they persist in treating the question of annulment for fraud as a matter of contract.¹⁶ While there is much discussion in the opinions¹⁷ as to

⁸ Dickinson v. Dickinson (1913), Prob. 198; Moore v. Moore supra, n. 6.
⁹ (Aug. 28, 1917), 54 Cal. Dec. 194, 167 Pac. 394.

¹⁰ Cal. Civ. Code, § 55.

¹¹ Id., § 82, subd. 4.

¹² Id., § 55.

¹³ Id., § 82, subd. 4.

¹⁴ Di Lorenzo v. Di Lorenzo (1903), 174 N. Y. 467, 67 N. E. 63; Robert v. Robert, supra, n. 6; Dorgeloh v. Murtha, supra, n. 6; Moore v. Moore, supra, n. 6.

¹⁵ Dickinson v. Dickinson, supra n. 8.

¹⁶ Keyes v. Keyes (1893), 26 N. Y. Supp. 910; Baker v. Baker, supra, n. 7; Robert v. Robert, supra, n. 6; Di Lorenzo v. Di Lorenzo, supra, n. 14; Sobol v. Sobol, supra, n. 7.

¹⁷ Sharon v. Sharon (1888), 75 Cal. 1; Di Lorenzo v. Di Lorenzo

what is necessary to have a valid marriage, the courts have not yet definitely determined just what, in legal parlance, constitutes marriage, and they seem to be unable to shake off the clinging terminology of the law of contract.

The danger in the decision lies in opening the door to collusive suites. Those who have no ground for divorce may be freed from a burdensome and foolish marriage by a suit for annulment, in which one party shall allege, and the other admit, that the latter entered into the marriage with the secret intention not to perform the essential obligations thereof, and thereafter refused to do so.

A. W. B.

PROCEDURE: SUITS IN FORMA PAUPERIS.—The right to sue *in forma pauperis* was a part of the common law adopted in 1850 by the state legislature of California and has not been curtailed since 1850 by legislative enactment. Such is the decision in *Martin v. Superior Court of California, in and for the County of Alameda*.¹ The entire Supreme Court held that the power to excuse a poor plaintiff from paying fees was inherent in English common law courts, and was exercised before any statutes were enacted in the subject. A portion of the court (a majority) also held that the statute of Henry VII which embodied this power was a part of the common law adopted in 1850 by the legislature of California.

The question seems to have come before American courts but few times. Two courts have held squarely that the right to sue *in forma pauperis* exists only by statute,² a third has a dictum to the same effect.³ A dictum in a Texas decision seems to be the only American case contra.⁴ But Marshall speaks of an exemption from court fees "at common law" to the plaintiff who swore that he was unable to pay them⁵ and there is dictum among the English cases to the same effect. Chief Justice Tindal in *Brunt v. Wardle*⁶ said "After all, is the 11 Henry VII c. 12 anything more than confirmatory of the common law?" His associate, Justice Maule, seemed to be of the same opinion, and both justices referred to the report of a case, twenty years before the statute of Henry VII, where a common law court was using this power.

This authority, standing by itself, seems meagre, but there are

supra, n. 14; *Dickinson v. Dickinson*, supra, n. 8; *Dorgeloh v. Murtha*, supra, n. 6.

¹ (Oct. 11, 1917), 54 Cal. Dec. 422, 168 Pac. 135.

² *Hoey v. McCarthy* (1890), 124 Ind. 466, 24 N. E. 1038. *Campbell v. Chicago Ry.* (1868), 23 Wis. 490. See 11 Cyc. 200.

³ *Roy v. Louisville R. R. Co.* (1888), 34 Fed. 276.

⁴ *Hickey v. Rhine* (1856), 16 Tex. 576.

⁵ *Law of Costs*, p. 347.

⁶ (1841), 133 Eng. Rep. R. 1254.